Yasuyuki Kayashima v Dato' Seri F Konishi & Anor

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–426 OF 2003
CHEW SOO HO JC
20 DECEMBER 2010

Evidence — Witness — Failure to call witness — Whether adverse inference ought to be drawn against plaintiff — Evidence Act 1950 s 114(g)

Labour Law — Employment — Termination — Insubordination — Meaning of — Plaintiff filed for wrongful dismissal — Allegations contained in termination letter — Whether proven — Whether acts cited alternatively or conjunctively — Whether termination wrongful — Termination letter referred to letter of reprimand — Whether plaintiff estopped from rebutting allegations of misconduct in letter of reprimand — Remedies — Whether plaintiff could claim damages for wrongful breach of employment agreement, general damages, aggravated and/or exemplary damages

Yasuyuki Kayashima ('the plaintiff') was employed as an executive director of Seapeck Food Sdn Bhd ('the second defendant') from 10 June 2002. However, the plaintiff alleged that he had been employed by the second defendant since 1 April 2002 and that he had been sent for training to Japan until 20 April 2002 before coming to Penang and officially entering into the employment agreement dated 10 June 2002. The defendants had found the plaintiff employee to have committed two acts of insubordination, namely, going to Songkla, Thailand to visit Pacific Fish Processing Co, which was a competitor of the second defendant, without the CEO's permission and when there were specific instructions given to the plaintiff to stay in the factory and attend to factory operations; and meeting with one Mr Ujiyama, the president of a fishmeal company, without informing the CEO of the said meeting. In addition to these two acts of insubordination the termination letter referred to a letter of reprimand that had been given to the plaintiff earlier in 2 January 2003, which cited three allegations of misconduct against the plaintiff, namely insubordination by his failure to return to work on 1 January 2003 as directed; unnecessarily wasting the second defendant company's expenses by taking the route from London-Tokyo-Singapore-Penang instead of London-Kuala Lumpur-Penang; and being absent from work on 2–3 January 2003 without applying for leave. Although the defendants had referred to the letter of reprimand in their termination letter to the plaintiff, the basis of the plaintiff's termination were the two acts of insubordination cited in the termination letter dated 21 February 2003. In his statement of claim the plaintiff denied all the

allegations. In respect of the first act of insubordination the plaintiff claimed that he had gone to Songkla with the knowledge of the acting general manager of the second defendant and that the visit was a factory related matter. As for the second act of insubordination the plaintiff averred that his meeting with the said Mr Ujiyama was a personal one. It was therefore the plaintiff's case that he was wrongfully terminated. He thus commenced the present action against the defendants wherein he claimed, inter alia, a declaration that the termination was null and void and of no effect, damages for wrongful breach of the employment agreement, general damages, as well as, aggravated and/or exemplary damages.

Held, entering judgment for the plaintiff by awarding him nominal damages in the sum of RM30,000 with costs of RM5,000:

(1) From the evidence this court was not satisfied that the plaintiff had proved on a balance of probabilities that he was employed by the first defendant since 1 April 2002 (see para 11).

(2) Although the allegations of misconduct cited in the letter of reprimand were not the grounds for the plaintiff's termination, the plaintiff was not estopped from rebutting those allegations because the defendants had referred to those past allegations in the letter of termination. The defendants had revived the issue and the plaintiff was therefore allowed to defend himself against those three allegations of misconduct (see para 16).

(3) The plaintiff's defence to the first allegation of misconduct was that it would be unreasonable to return to work on 1 January 2003, which was a public holiday, and that he had spent a few non-working days working in London were found to be reasonable explanations. However, the important question was not merely whether the order of the first defendant being the plaintiff's superior was reasonable or not but whether it was primarily lawful, for as long as it was lawful the plaintiff would have to comply with it. The instructions in the present case were lawful and thus the failure of the plaintiff to comply with it constituted a disobedience to an order by his superior and the allegation of insubordination, which was the first allegation of misconduct, was established. There was insufficient evidence to prove the second allegation in the letter of reprimand. As such the second allegation was not substantiated and proved by the defendants. In respect of the third allegation the plaintiff claimed that he was entitled to replacement leave but the employment agreement was silent on any right to replace non-working days involved in business trips with annual leave as claimed by the plaintiff. Thus the third allegation in the letter of reprimand that the plaintiff was absent from work without leave was proved (see paras 17, 19 & 21).

(4) Based on the letter of termination it was clear that the sole ground for the termination was insubordination as a consequence of the two acts of the plaintiff. When the grounds for termination were challenged by the employee, the burden to justify the termination was on the defendants as employers. In the second defendant's minutes of meeting it was recorded that the plaintiff was to act as advisor for all factory related matters. This was a proper and lawful order given by the plaintiff's superior to the plaintiff and the plaintiff had a duty to abide by that instruction. Although the plaintiff claimed that he had visited the Pacific Fish Processing Co in Thailand on factory related matters, no evidence had been led to substantiate the plaintiff's contention. As such the court was not satisfied on a balance of probabilities that the plaintiff's visit to Thailand was a factory related matter. Instead it was found that the plaintiff who was to act as an advisor to factory related matters ought to be in the factory rather than out of the country to negotiate business on his own. Further the plaintiff's evidence that the acting general manager had approved the trip was unsubstantiated hearsay evidence. The plaintiff's failure to call the acting manager as a witness also attracted an adverse inference being drawn against him under s 114(g) of the Evidence Act 1950. As such, the plaintiff had failed to rebut this aspect of insubordination and on a balance of probabilities the defendants had established the first act of insubordination (see paras 13 & 24).

(5) The second act of insubordination was premised on uncertainty and suspicion which could not be used as the basis to justify an act of insubordination. The defendants as employers could not impose on the plaintiff the implied obligation that he ought to seek the defendants' prior consent before meeting an acquaintance with whom the defendants may have some dealings, when such meeting was a personal one that had no relations with the second defendant company. As such, the defendants had failed on a balance of probabilities to prove this second act of insubordination (see para 26).

(6) As the acts of insubordination were not cited in the alternative but conjunctively, the burden was on the defendants to justify not one but both the said acts. In the instant case if the defendants deemed both acts to adequately constitute their grounds to terminate the plaintiff, it was not for this court to substitute its views by saying that only one of the two will suffice to justify the plaintiff's termination. Since the defendants had failed to prove the second act of insubordination the termination of the plaintiff was unjustified and wrongful (see para 37).

(7) The plaintiff's remedy only lies in damages for wrongful breach of the employment agreement but did not extend to general damages, aggravated damages and/or exemplary damages. In any event the plaintiff had failed to prove damages and was only entitled to nominal damages (see paras 35 & 37–38).

[Bahasa Malaysia summary

Yasuyuki Kayashima ('plaintif') telah diambil kerja sebagai pengarah eksekutif Seapeck Food Sdn Bhd ('defendan kedua') dari 10 Jun 2002. Walau bagaimanapun, plaintif mengatakan bahawa dia telah diambil bekerja oleh defendan kedua sejak 1 April 2002 dan bahawa dia telah dihantar untuk latihan ke Jepun sehingga 20 April 2002 sebelum datang ke Pulau Pinang dan secara rasmi memasuki perjanjian pekerjaan bertarikh 10 Jun 2002. Defendan-defendan mendapati plaintif pekerja telah melakukan dua tindakan ingkar perintah, iaitu, pergi ke Songkla, Thailand untuk melawat Pacific Fish Processing Co, yang merupakan pesaing defendan kedua, tanpa kebenaran ketua pegawai eksekutif ('KPE') dan apabila arahan spesifik diberikan kepada plaintif untuk tinggal di kilang itu dan menguruskan operasi kilang itu; dan berjumpa dengan Encik Ujiyama, presiden syarikat makanan ikan, tanpa memberitahu KPE tentang mesyuarat tersebut. Tambahan kepada dua tindakan ingkar perintah tersebut surat pemberhentian telah merujuk kepada surat teguran yang telah diberikan kepada plaintif sebelum itu pada 2 Januari 2003, yang menyatakan tiga dakwaan salah laku terhadap plaintif, iaitu ingkar perintah kerana kegagalannya kembali bertugas pada 1 Januari 2003 sebagaimana diarahkan; tanpa sebab membazir perbelanjaan syarikat defendan kedua kerana telah mengambil laluan dari London-Tokyo-Singapura-Pulau Pinang dan bukan London-Kuala Lumpur-Pulau Pinang; dan tidak hadir bekerja pada 2–3 Januari 2003 tanpa memohon cuti. Walaupun defendan-defendan telah merujuk surat teguran itu dalam surat pemberhentian mereka kepada plaintif, asas pemberhentian plaintif adalah dua tindakan ingkar perintah yang dinyatakan dalam surat pemberhentian bertarikh 21 Februari 2003. Dalam penyataan tuntutannya, plaintif telah menafikan semua dakwaan tersebut. Berhubung tindakan ingkar perintah yang pertama plaintif mendakwa bahawa dia telah pergi ke Songkla dengan pengetahuan pemangku pengurus besar kepada defendan kedua dan lawatan itu adalah perkara berkaitan kilang. Berhubung tindakan ingkar perintah kedua plaintif menegaskan bahawa mesyuaratnya dengan Encik Ujiyama bersifat peribadi. Oleh itu kes plaintif adalah bahawa dia telah diberhentikan secara salah. Dia dengan itu telah memulakan tindakan ini terhadap defendan-defendan di mana dia mendakwa, antara lain, satu deklarasi bahawa pemberhentian itu adalah terbatal dan tak sah dan tiada kesan, ganti rugi kerana pelanggaran salah perjanjian pekerjaan, ganti rugi am dan juga ganti rugi tambahan dan/atau teladan.

Diputuskan, memasuki penghakiman bagi pihak plaintif dengan mengawardkannya ganti rugi nominal berjumlah RM30,000 dengan kos RM5,000:

(1) Berdasarkan keterangan mahkamah ini tidak berpuas hati bahawa

plaintif telah membuktikan atas imbangan kebarangkalian bahawa dia telah diambil bekerja oleh defendan pertama sejak 1 April 2002 (lihat perenggan 11).

(2) Meskipun dakwaan-dakwaan salah laku dinyatakan dalam surat teguran bukan alasan-alasan untuk pemberhentian plaintif, plaintif tidak diestopkan daripada mematahkan dakwaan-dakwaan tersebut kerana defendan-defendan telah merujuk kepada dakwaan-dakwaan lepas dalam surat pemberhentian. Defendan-defendan telah menimbulkan semula isu tersebut dan plaintif dengan itu dibenarkan untuk membela dirinya terhadap tiga dakwaan salah laku (lihat perenggan 16).

(3) Pembelaan plaintif terhadap dakwaan pertama salah laku adalah bahawa ia tidak munasabah untuk kembali bertugas pada 1 Januari 2003, yang merupakan cuti umum, dan bahawa dia telah menghabiskan beberapa hari bekerja pada hari-hari bukan hari bekerja di London yang boleh diterima sebagai penjelasan munasabah. Walau bagaimanpun, soalan penting bukan sahaja sama ada arahan defendan pertama yang merupakan ketua plaintif adalah munasabah atau tidak tetapi ia sememangnya sah di sisi undang-undang, selagi ia adalah sah di sisi undang-undang dan plaintif patut mematuhinya. Arahan dalam kes ini adalah sah di sisi undang-undang dan oleh itu kegagalan plaintif mematuhinya membentuk ketidaktaatan kepada arahan oleh ketuanya dan dakwaan ingkar perintah, yang merupakan dakwaan pertama salah laku telah dibuktikan. Keterangan tidak mencukupi untuk membuktikan dakwaan kedua dalam surat teguran. Oleh itu dakwaan kedua tidak dapat dikekalkan dan dibuktikan oleh defendan-defendan. Berhubung dakwaan ketiga plaintif mendakwa bahawa dia berhak mendapat cuti ganti tetapi perjanjian pekerjaan tidak menyebut tentang apa-apa hak menggantikan hari bukan hari bekerja termasuk dalam lawatan perniagaan dengan cuti tahunan sepertimana didakwa oleh plaintif. Oleh itu dakwaan ketiga dalam surat teguran bahawa plaintif tidak hadir bekerja tanpa cuti telah dibuktikan (lihat perenggan 17, 19 & 21).

(4) Berdasarkan surat pemberhentian adalah jelas bahawa satu-satunya alasan untuk pemberhentian adalah ingkar perintah akibat daripada dua tindakan plaintif. Apabila alasan-alasan untuk pemberhentian dicabar oleh pekerja, beban menjustifikasikan pemberhentian itu terletak pada defendan-defendan sebagai majikan. Dalam minit mesyuarat defendan kedua telah direkodkan bahawa plaintif patut bertindak sebagai penasihat untuk semua perkara berkaitan kilang. Ini adalah arahan yang wajar dan sah yang diberikan oleh ketua plaintif kepada plaintif dan plaintif mempunyai kewajipan untuk mematuhi arahan tersebut. Meskipun plaintif mengatakan bahawa dia telah melawat Pacific Fish Processing Co di Thailand atas dasar perkara berkaitan kilang, tiada

keterangan dapat mengekalkan hujah plaintif. Oleh itu mahkamah tidak berpuas hati atas imbangan kebarangkalian bahawa lawatan plaintif ke Thailand adalah berhubung perkara berkaitan kilang. Sebaliknya adalah didapati bahawa plaintif yang patut bertindak sebagai penasihat berhubung perkara berkaitan kilang patut berada di kilang itu dan bukan di luar negara untuk berunding tentang perniagaannya sendiri. Bahkan keterangan plaintif bahawa pemangku pengurus besar telah meluluskan lawatan bukan keterangan dengar cakap yang kukuh. Kegagalan plaintif untuk memanggil pemangku pengurus sebagai saksi juga membentuk inferens bertentangan yang dapat dibuat terhadapnya di bawah s 114(g) Akta Keterangan 1950. Dengan itu, plaintif telah gagal untuk mematahkan aspek ingkar perintah ini dan atas imbangan kebarangkalian defendan-defendan telah membuktikan dakwaan pertama ingkar perintah (lihat perenggan 13 & 24).

(5) Tindakan kedua ingkar perintah berdasarkan ketidaktentuan dan syak wasangka yang tidak boleh digunakan sebagai asas untuk menjustifikasikan tindakan ingkar perintah. Defendan-defendan sebagai majikan tidak boleh mengenakan ke atas plaintif tanggungjawab tersirat yang dia patut memohon persetujuan defendan-defendan terlebih dahulu sebelum berjumpa kenalan yang mana defendan-defendan mungkin ada beberapa urusan bersama, di mana perjumpaan itu bersifat peribadi yang tiada kaitan dengan defendan kedua syarikat. Oleh itu, defendan-defendan telah gagal atas imbangan kebarangkalian membuktikan tindakan kedua ingkar perintah ini (lihat perenggan 26).

(6) Oleh kerana tindakan-tindakan ingkar perintah tidak dinyatakan secara alternatif tetapi bersifat penghubung, beban terletak ke atas defendan-defendan untuk menjustifikasikan bukan satu tetapi kedua-dua tindakan tersebut. Dalam kes ini jika defendan-defendan menganggap kedua-dua tindakan cukup untuk membentuk alasan memberhentikan plaintif, ia bukan untuk mahkamah ini menggantikan pandangannya dengan menyatakan bahawa hanya satu daripada dua adalah mencukupi untuk menjustifikasikan pemberhentian plaintif. Oleh kerana defendan-defendan telah gagal membuktikan tindakan kedua ingkar perintah maka pemberhentian plaintif tidak wajar dan salah (lihat perenggan 27).

(7) Remedi plaintif hanya terletak pada ganti rugi untuk pelanggaran perjanjian pekerjaan yang salah tetapi tidak meliputi ganti rugi am, ganti rugi tambahan dan/atau ganti rugi teladan. Dalam apa keadaan plaintif telah gagal membuktikan ganti rugi dan hanya berhak mendapat ganti rugi nominal (lihat perenggan 35 & 37–38).]

Notes

For cases on failure to call witness, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3135–3145.

For cases on termination, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1320–1330.

Cases referred to

Addis v Gramophone Company, Limited [1909] AC 488, HL (refd)
Aetna Universal Insurance Sdn Bhd v Ooi Meng Sua [2001] 3 MLJ 502; [2001] 3 CLJ 1, CA (refd)
Commissionersfor executing office of Lord High Admiral of United Kingdom v Owners of Steamship Susquehanna, The Susquehanna [1926] AC 655, HL (refd)
International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86, FC (refd)
Lim Tow Peng & Anor v Singapore Bus Services Ltd [1976] 1 MLJ 254; [1976] 1 LNS 64, CA (refd)
Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor [1997] 2 MLJ 361; [1997] 3 CLJ 135, FC (refd)
Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153; [1998] 1 CLJ 405, FC (refd)
Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd [2006] 5 MLJ 113; [2006] 3 CLJ 837, FC (refd)
Perbadanan Perwira Harta Malaysia & Anor v Mohd Baharin bin Hj Abu [2010] 5 MLJ 295; [2010] 6 CLJ 1, CA (refd)
Perestrello e Companhia Limitada v United Paint Co; Same v Same [1969] 1 WLR 570, CA (refd)
Prehn and another v The Royal Bank of Liverpool (1869–71) 5–6 LR Exch 92 (refd)
Rookes v Barnard and others [1964] AC 1129, HL (refd)
SR Fox v Ek Liong Hin Ltd [1957] MLJ 1 (refd)
Stroms Bruks Aktie Bolag v John & Peter Hutchison [1905] AC 515, HL (refd)
Zakiah bte Ishak v Majlis Daerah Hulu Selangor [2005] 6 MLJ 517; [2005] 4 CLJ 77, CA (refd)

Legislation referred to

Evidence Act 1950 ss 102, 103, 114(g)

Jagdeep Singh (Karpal Singh & Co) for the plaintiff.
Pravin Kaur (Jessy & Associates) for the defendants.

Chew Soo Ho JC:

BRIEF FACTS

[1] The plaintiff was employed by the second defendant as an executive director vide an employment agreement made between them on 10 June 2002 and commencing on the same date for the duration of the plaintiff's work permit which was valid until 31 May 2004 then and upon successful renewal,

for a further term corresponding with the duration of the plaintiff's work permit as may be agreed upon by them up to a maximum of 11 years.

[2] The agreed salary is Japanese Yen of 10m per annum payable in Ringgit Malaysia of its equivalence.

[3] The plaintiff alleged that he was in fact employed by the first defendant as executive chairman and chief executive officer ('CEO') of the second defendant since 1 April 2002 and had been in training in Japan until 20 April 2002; thereafter he came to Penang and worked with the first defendant before officially entering into the employment agreement dated 10 June 2002.

[4] Vide a letter dated 21 February 2003, the plaintiff was terminated by the second defendant with immediate effect on two acts of insubordination that he had gone to Songkla Thailand on 20 and 21 February 2003 to visit Pacific Fish Processing Co Ltd, a competitor of the second defendant, without the CEO's permission contrary to the specific instructions by the CEO to him to stay in the factory to attend to operations, and that on 19 February 2003, the plaintiff had privately met with Mr Ujiyama, President of Taikyo Ltd, a fish meal processing company which was supposed to enter into a technical service agreement with ASK Andaman Ltd, without having informed the CEO and in contravention of the CEO's instruction to stay in the factory to attend to operations. For these two reasons and also with reference to an earlier letter of reprimand to the plaintiff dated 2 January 2003, the plaintiff was alleged to have committed acts of insubordination pursuant to cl 13.1(i)(b) of the employment agreement dated 10 June 2002, resulting in the defendants terminating the plaintiff's contract of service. The plaintiff denied all the allegations and averred that he went to Songkla with the knowledge of Mr Sim Khee Saik, the acting general manager of the second defendant, who had not prevented plaintiff from going and hence he had agreed and acquiesced to the plaintiff's action. As to the meeting with Mr Ujiyama, plaintiff averred that it was a personal dinner appointment with an acquaintance; nevertheless, he had at all material times promoted the welfare of Texchem Group including the second defendant during the said meeting.

[5] On the letter of reprimand dated 2 January 2003, the plaintiff was reprimanded for allegedly committed insubordination involving the date of his return trip from London to Penang, unnecessarily wasting company's expenses by flying from London to Tokyo, then Tokyo-Singapore-Penang instead of from London to Penang directly and that plaintiff had not applied for annual leave for the dates he was not back to work in Penang when he was supposed to be. The plaintiff explained that he was unable to be back to Penang on 1 January 2003 as he accompanied Mr Satake back to Tokyo. He also averred that by his flight schedule via Tokyo, he had saved company expenses; it was also for

reason that he had been instructed to pick up Mr Satake, a surimi expert in Japan before proceeding to London for the meeting in which plaintiff was to act an interpreter. As to the dates 2 January 2003 and 3 January 2003, the plaintiff's averred that flight reached Japan in the morning of 2 January 2003; he contended that he was entitled to an off day for having worked on off days and hence there was no need to apply leave.

[6] The plaintiff contended, inter alia, that he was wrongfully terminated; his termination was in breach of natural justice; a wrongful repudiation of the employment agreement dated 10 June 2002. He sought a declaration that his termination is null and void and claimed damages for wrongful repudiation and breach of the employment agreement, general damages, aggravated and/or exemplary damages, interest, costs and other relief.

[7] The defendants denied that plaintiff was employed commencing from 1 April 2002 but from 10 June 2002. The defendants relied on cl 13.1 of the employment agreement dated 10 June 2002 to terminate the plaintiff with effect from 21 February 2003 on grounds as stated therein. The plaintiff was specifically instructed to return to Penang from London on 1 January 2003 with sample of 'crabstick' from United Kingdom for the company meeting scheduled on 2 January 2003 but plaintiff only returned on 6 January 2003 and no leave was applied for. The defendants maintained that plaintiff had committed insubordination when he failed to follow instructions. On the meeting with Mr Ujiyama, the defendants asserted that it had nothing to do with plaintiff's work but was in fact against the interest of the company as plaintiff's intention as reflected in his email to Mr Ujiyama dated 11 February 2003 (D — p 75) was to try to develop their own network for their future business. On the letter of reprimand, the defendants contended that plaintiff had not replied nor objected to it; thus, he is estopped from raising it in this suit. It was also contended that plaintiff after having received this letter of reprimand for, inter alia, his failure to comply with the specific instruction to him to return on 1 January 2003, did not do anything to correct the accusation but kept silent until his employment was terminated. 2–3 January 2003 were working days and plaintiff did not apply for leave when he did not return for work. The defendants averred that plaintiff had committed insubordination and the termination of his employment agreement pursuant to cl 13.1(i)(b) therein was justified.

THE ISSUES

[8] The broad issue before this court is whether the termination of the employment agreement dated 10 June 2002 entered into between the second

defendant and the plaintiff pursuant to cl 13.1(i)(b) was wrongful or justified.

EVALUATION FINDINGS

[9] The employment agreement (bundle D, pp 1–4) entered into between the second defendant and the plaintiff on 10 June 2002 is not in dispute.

[10] The plaintiff, however, contended that he was first appointed commencing from 1 April 2002; he underwent training in Japan until 20 April 2002 and thereafter he came to Penang to work for the first defendant before he officially entered into the said employment agreement. He alleged that he was not paid his salary for the months of April and May 2002. The first defendant denied that plaintiff was appointed since 1 April 2002. He explained that they never had a factory in Japan nor an office there and it was their long time tradition to invite candidate from foreign country to come to their office to meet the people whom the candidate was supposed to work together. The plaintiff who was recommended by the second defendant's managing director Mr Keda, had visited the Penang company before employment possibly in May 2002 and their sister company in Yangon and in Singapore. The first defendant added that plaintiff was 49 years of age, had been working in big corporation and experienced; there was thus no training necessary for the plaintiff. The defendants further contended in submission that the plaintiff had not made a claim for the two months salary in his statement of claim.

[11] On this point, from the evidence before this court, apart from what had been alleged by the plaintiff, there is no evidence at all that he was appointed by the first defendant with effect from 1 April 2002. There was no letter of appointment, no evidence of his designation nor evidence of his salary per month. Although evidence from plaintiff's email dated 2 May 2002 and its reply (bundle D, p 39) showed that flight had been booked for his trip to Yangon with Mr Sim Khee Saik. I find that first defendant had rebutted the plaintiff's allegation of employment from his evidence that potential candidate from foreign country was, in their long term practice, invited to visit their company and sister companies before actual employment and this included their company in Yangon. In the absence of any other evidence from the plaintiff, this court is not satisfied that the plaintiff had proved on a balance of probabilities that he was employed by the first defendant since 1 April 2002. In any event, even if it is accepted that vide the aforesaid emails in bundle D, p 39, the plaintiff had presumably assumed work, it only showed that the plaintiff had probably commenced work in May 2002 but there is not an *iota* of evidence to prove that he had worked for the defendants since April 2002 especially so when the defendants had no factory or office in Japan for the plaintiff to allegedly undergo training there in April 2002. It is however a fact that the plaintiff had never written to the defendants for his alleged salary for

April and May 2002 nor did he call the former MD of the second defendant as his witness to whom he had allegedly directed his claim. There is insufficient evidence to satisfy his onus of proof; see *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 (FC). Although plaintiff had pleaded his allegation of employment since April 2002 and the non-payment of his salary for the said two months in the body of his statement of claim, he had nevertheless declined to claim them vide his para 23 where he formulated all his claims. Whether it was an inadvertent oversight or an abandonment, since the plaintiff did not make this claim, it should therefore be a non-issue.

[12] Moving on to the termination of the said employment agreement, the undisputed letter of termination of employment dated 21 February 2003 (bundle D, p 18) is of paramount importance as it formed the basis for the termination of the plaintiff's employment agreement. For ease of reference, this letter is reproduced as follows:

SEAPACK FOOD SDN. BHD.

(A MEMBER OF THE TEXCHEM GROUP)

COMPANY NO. 204341-V)

FACTRY ADDRESS: PLOT 575, PRAI FREE INDUSTRIES ZONE, PRAI INDUSTRIAL ESTATE

13600 PRAI, P.W.C., PENANG, MALAYSIA.

TEL NO: 604-3997306, 3997292, 3997294 FAX NO: 604-3997304

CORPORATEN OFFICE: LEVEL 15, MENARA PSCI, 39, JALAN SULTAN AHMAD SHAH, 10500

PENANG.

TEL: 604-2296000 FAX: 604-2291389

URL: seapackfood.com

21st February 2003

Mr Yasuyuki Kayashima

Seapack Food Sdn Bhd

Re: TERMINATION OF EMPLOYMENT

I wish to inform you that you are hereby terminated from your employment in Seapack Food Sdn Bhd with immediate effect due to the following acts of insubordination:

(1) On 20th and 21st February 2003 you had gone to Songkla, Thailand to visit Pacific Fish Processing Co. Ltd, a competitor of Seapack Sdn Bhd without the Chief Executive Officer (CEO)'s permission, even though specific instructions had already been given to you earlier by the CEO to stay in the factory to attend to the operations;

(2) On 19th February 2003 you had privately met with Mr. Ujiyama, President of Taikyo Ltd, a fishmeal processing company, which is supposed to enter into a technical service agreement with A.S.K. Andaman Ltd and had failed to inform the CEO of this private meeting which is an important matter to the company and this is also in contravention of the CEO's instruction for you to stay in the factory to attend to the operations.

In view of the above incidents and also with reference to the Letter of Reprimand dated 2 January 2003 (a copy is enclosed) given to you earlier, you have thereby committed acts of insubordination in relation to Clause 13.1(i)(b) of your Employment Agreement dated 10th June 2002.

You are hereby required to surrender all company properties in your possession (if any) immediately. You are also required to do the necessary income tax clearance and cancellation of work permit for which we will provide you with necessary assistance.

Yours truly,

.....

DATO'SERI F. KONISHI

EXECUTIVE CHAIRMAN/CHIEF EXECUTIVE OFFICER

[13] From this letter of termination, the sole ground for the termination is insubordination as a consequence of two acts of the plaintiff as stipulated in items 1 and 2 in para 1 therein. In addition, the defendants also referred to the earlier letter of reprimand dated 2 January 2003 (bundle D, p 11) issued to the plaintiff to aggravate the ground of insubordination which the defendants relied on to justify termination of the employment contract. This court will thus determine the letter of reprimand dated 2 January 2003 and the two incidents or acts of insubordination as stated in the letter of termination above to decide on the main issue of this case. The burden to justify the termination is on the defendants as employer when such termination or grounds for the termination of employment is challenged by the employee; see *SR Fox v Ek Liong Hin Ltd* [1957] MLJ 1 cited by the Court of Appeal in *Aetna Universal Insurance Sdn Bhd v Ooi Meng Sua* [2001] 3 MLJ 502; [2001] 3 CLJ 1 at p 5.

[14] What constitute 'insubordination'? In *OP Malhotra's The Law of Industrial Disputes* (6th Ed), Vol 2 at p 1153, the learned author gave the meaning of the words as follows:

> The word 'insubordination' means unwillingness to submit to authority; disobedience to orders; infraction of rules, or generally disaffected attitude towards authority. The *Concise Oxford Dictionary* gives the meaning of 'insubordination' as 'disobedient', rebellious'. The two meanings given by the dictionary do not mean that only a rebellious conduct would amount to insubordination but even disobedient conduct would amount to insubordination. The *Random House Dictionary* gives the meaning of 'insubordination' as 'not submitting to authority;

disobedient, one who is insubordinate'. These meanings would indicate that any person who is 'disobedient' becomes 'insubordinate' and his conduct amounts to 'insubordination'. Therefore, where a workman disobeys a lawful order, he can be said to be guilty of 'insubordination' and it need hardly be stated that a misconduct of disobedience and insubordination would also amount to indiscipline. The word 'disobedience' means refusal to obey or negligence in obeying a command; violation or disregard of a rule or prohibition …

[15] The above cited meanings of the word 'insubordination' derived principally from dictionary meanings which the learned author had referred to and captured. Although they are given in relation to industrial disputes, I am of the view that these meanings apply with equal force to the instant case involving the allegation of breach of contractual term in an employment contract. With that in mind, I shall consider the allegations of the conduct or acts of the plaintiff which were said to constitute insubordination to determine whether insubordination was proved or otherwise.

LETTER OF REPRIMAND (BUNDLE D P 11)

[16] It cannot be gain said that the letter of reprimand which is itself a form of punishment though construed as minor, cannot be the ground relied upon to terminate the employment contract of the plaintiff; it could however be referred to as an aggravating factor towards such termination based on fresh grounds in the sense that plaintiff had previously committed the alleged similar breach and hence subsequent similar breach would have no excuse. The rationale is that the previous allegations of insubordination in the letter of reprimand had been dealt with; they are considered spent with the plaintiff having been reprimanded instead of being terminated. When the defendants deemed the plaintiff's alleged insubordination to merit only a warning or reprimand, for which such a letter was issued, it would therefore be unjustified to revive the past insubordination as a ground for termination of the employment. To do so would tantamount to punishing an employee twice for the same insubordination which he had been previously dealt with by a warning letter or a letter of reprimand. Nevertheless, since the defendants had referred to the said letter of reprimand in the letter of termination to the plaintiff, the plaintiff must have the right to defend and rebut those allegations of insubordination contained therein even though he had not done so in writing earlier. I do not agree with the submission by learned counsel for the defendants contending that the plaintiff is estopped from doing so now since he had not raised any objection to the allegations in the letter of reprimand for simple reason that the defendants had surfaced the past allegations of insubordination which had been dealt with in the letter of termination; hence when the defendants had revived the issue, the plaintiff ought to be allowed to defend it. His failure to reply or rebut the allegations earlier goes to the weight

but does not affect his right to defend or rebut the issue in the trial. Three allegations of misconduct were stated in the letter of reprimand dated 2 January 2003 namely:

(1) Insubordination;

(2) Unneccessarily wasting company's expenses by flying from London to Tokyo for a stopover, then Tokyo/Singapore/Penang; and

(3) Your time cost which is uncounted for, since you have not applied for your annual leave.

[17] By insubordination, the second paragraph of this letter of reprimand said, 'Mr Kayashima, I remembered that I gave specific instructions to you to come back on 1 January, so that you could report to me about your trips as quickly as possible'. However, the plaintiff only returned to work on 6 January 2003 officially which is not disputed. This failure to return to Penang from London on 1 January 2003 but only on 6 January 2003 is the insubordination in the first allegation. Evidence of the first defendant, ('SD2') is that he wanted the plaintiff to return to Penang on 1 January 2003 as they would be having a meeting on 2 January 2003 and any sample to be brought back from London could be discussed and decision could be made to manufacture the crabsticks for UK market by summer which was anticipated to be the season to boost the sale of their products. The plaintiff contended that he had not received such instruction on the one hand and alleged on the other hand that he had informed the first defendant that he could not return on 1 January 2003. He further contended that it was unreasonable for him to return on 1 January 2003 which was a public holiday and he had spent a few non-working days working in London. The important question is not merely whether the order of the first defendant, being the plaintiff's superior, was reasonable or unreasonable but whether it was primarily lawful. As long as the order or instruction is lawful, the subordinate must comply and abide by that lawful order or instruction and it is not for him to argue that it is unreasonable; see *Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd* [2006] 5 MLJ 113; [2006] 3 CLJ 837 (FC). The plaintiff was an executive director of the second defendant. It is difficult to believe that he did not know the company meeting on 2 January 2003. The first defendant, the signatory of the letter of reprimand (D — p 11) stated expressly that he gave specific instruction to the plaintiff to return on 1 January 2003. Apart from the plaintiff's mere denial, there is no evidence that he refuted that fact upon receipt of D, p 11.1 do not see anything unlawful to ask the plaintiff to travel back to Penang from London on 1 January 2003 though it was public holiday or a non-working day. I accept the evidence of SD2 that in business, it is common that they do travel during the travel period involving non-working days. On a balance of probabilities, I find that the failure of the plaintiff to comply with the lawful

order or instruction of the first defendant constitutes a disobedience to his order or instruction and hence the allegation of insubordination is established.

[18] On the second allegation of wasting company's expenses, I find from the facts and evidence adduced that there is insufficient evidence to show that the plaintiff by taking the route from London-Tokyo-Singapore-Penang instead of London-Kuala Lumpur-Penang directly had incurred a higher expenses to constitute wasting of company's expenses. SD1 was unaware of the difference in the prices of the flights between the two routes and similarly SD2 was unsure and even agreed in cross-examination that the fees for the plaintiff's route could be less referring to D, p 53 and D, p 19. D, p 19 is the invoice from Hoopers Travel to the second defendant showing the ticket charges of RM6,869 for the route taken by the plaintiff via Tokyo while the email from Christine to the plaintiff in D, p 53 showed the air fare of the other route to cost RM18,312. I do agree with learned counsel for the defendants when she submitted that the plaintiff's counsel had not tendered and marked D, p 53 as exhibit since it was disputed document for which this court should not consider D, p 53. However, I cannot ignore the clear admission by the first defendant that the plaintiff's route cost lesser than he were to travel on the direct route. I find this second allegation in the letter of reprimand not substantiated and proved by the defendants.

[19] As to the third allegation of the plaintiff's failure to apply leave, I am satisfied that the leave application process or procedure in the second defendant is as described by SD1. According to SD2, the plaintiff only reported back to work on 6 January 2003 and was absent for work from 2 January 2003 to 3 January 2003 without applying for leave. The plaintiff contended that he was working on three off days from 24 December 2002 to 1 January 2003 during his trip to London that he was surely entitled to report back for work on 6 January 2003; he had returned to Penang on 4 January 2003 and 5 January 2003 was a Sunday. In brief, the plaintiff is contending that he is entitled to replacement leave for the non-working days that he was allegedly working in London/Aberdeen. SD2 seemed to say that the plaintiff must apply leave for his absence on 2 January 2003 and 3 January 2003. SD1, the general manager for Human Resources of Texchem Corp, the parent company of the second defendant, confirmed that the plaintiff had never applied for annual leave for 2 and 3 January 2003. If plaintiff is claiming that he is entitled to replacement leave, the onus is on him to show that under his contract of employment or any other source, there is such a provision which entitled him to claim leave of such nature. The best person for the company to know this fact is the general manager in charge of human resources ie SD1 but he was never cross-examined on any such entitlement of the plaintiff in situation when he travelled overseas for work which involved non-working days whether he was entitled to have replacement leave for those non-working days involved in his trip. In the

plaintiff's employment agreement, D, pp 1–4, cl 6 in particular which provides for the leave entitlement is silent on any right to replace non-working days involved in business trip with annual leave as claimed by the plaintiff. On a balance of probabilities, I find that the plaintiff does not enjoy such right vide his employment agreement and must therefore apply for leave for his absence from work on 2 and 3 January 2003. I am satisfied that the plaintiff was absent from work without leave which he had never applied for and this is an act of misconduct.

[20] Learned counsel for the plaintiff had contended during cross-examination of SD2 that the letter of reprimand was prepared on 6 January 2003 but back dated to 2 January 2003 because SD2 (the first defendant) had known that the plaintiff would resume work on 6 January 2003 and had known that the plaintiff 'have flown from London to Narita, and then from Narita back to Penang via Singapore'. However, the clear evidence from the plaintiff himself is that when he went to his office upon his return on 4 January 2003, the letter of reprimand was on his table. That being the fact, how could this same letter be only prepared on 6 January 2003 and be backdated to 2 January 2003 when it was admitted to be on the plaintiff's table on 4 January 2003? To attempt to hairsplit in such circumstances only reflects the non-appreciation of the clear evidence from his own client with an unwarranted attempt to achieve an insignificant point which only leads to a waste of judicial time.

THE PLAINTIFF'S TERMINATION

[21] Although this court had found the second allegation in the letter of reprimand not having been proved, this alone is insufficient to allow the plaintiff's claim. As stated earlier, this letter of reprimand is not the basis or main ground cited in the termination letter (D — p 18). What is pertinent is the two acts of insubordination which formed the basis for the defendants to terminate the plaintiff's employment agreement dated 10 June 2002 as expressly stated in the aforesaid reproduced letter of termination of employment (D — p 18). This court will have to determine these two acts or allegations of insubordination whether they are proved and/or suffice to justify the plaintiff's termination of employment. The first act or allegation states that:

> On 20th and 21st February you had gone to Songkla, Thailand to visit Pacific Fish Processing Co. Ltd, a competitor of Seapack Food Sdn Bhd without the Chief Executive Officer (CEO)'s permission, even though specific instructions had already been given to you earlier by the CEO to stay in the factory to attend to the operations.

[22] There is no denial by plaintiff that he had gone to Songkla to visit Pacific

Fish Processing Co Ltd on 20–21 February 2003. His contention was that the instructions to him did not restrict him to the factory premises but that he could be working outside the factory pertaining to factory related matters or operations matters. He alleged that he went to Songkla on factory related matters and it was with the knowledge and approval of Mr KS Sim, the acting general manager of the second defendant. He further alleged that he went to Songkla by car and there was no necessity to apply in writing for approval vide business travelling application which only involved business trip by flights.

[23] The defendants through SD1 gave evidence that before the plaintiff travelled on business, he was required to submit a business travelling application to the managing director of the second defendant. He produced exhs D12 and D12A to show that the plaintiff had previously applied using the said form. Subsequently, SD1 would contact the travel agents to make reservations for the plaintiff's travel. Pertaining to this Songkla trip on 20–21 February 2003, SD1 said that there was no record of the plaintiff making any application using the said format. He also stated he had checked with Mr KS Sim on the Songkla trip by the plaintiff and it was confirmed that Mr KS Sim was unaware of the plaintiff's trip. SD2, the first defendant, also said that the plaintiff had not obtained prior approval before he left for Songkla.

[24] The first question to ask in this first allegation of insubordination is whether there is such an order and instruction which must be lawful from the defendants to the plaintiff that he should only confine himself to factory operations and hence he was disallowed to perform any work or duty outside the factory premises of the employer. The defendants relied on the second defendant's minutes of meeting dated 13 January 2003 (D, pp 13–17) where it was recorded that the plaintiff 'is to act as advisor for all factory related matters (excluding local & export sales and finance department) and reporting to the acting GM' (D, p 14, item No 1). I find this order or instruction given to the plaintiff during the company meeting which had been duly recorded to be work related and thus a proper and lawful order given by the first defendant as the superior of the plaintiff to the plaintiff. Hence the plaintiff had the duty to abide by that order or instruction. The plaintiff claimed that he had gone to Songkla on factory related matters. However, he admitted writing an email to Mr Ujiyama dated 11 February 2003 (exh D11 at p 75 of bundle D) in which the plaintiff had stated that he would not be with the second defendant for long and sought the help of Mr Ujiyama requesting Mr Ujiyama to go to Hadyai to meet up with him 'to try to develop our own network for our future business'. The plaintiff explained that he felt at that time that he would be terminated of his employment by the first defendant. On his assertion of developing their own network for their future business, he said it was a joke. From the reading of this email, I cannot find the plaintiff's explanation of a joke plausible. He felt or anticipated that he would be terminated his employment and requested to

meet up with Mr Ujiyama for his help to develop their network for their future business; this is indeed in tandem with his anticipation of being terminated by the first defendant. I find what the plaintiff had said in his said email is as what he intended. This email had given rise to a doubt as to the intent and purpose of the plaintiff's visit to Pacific Fish Processing Co Ltd in Thailand. In addition, no evidence of any record of what transpired in Songkla or Hatyai had been led to show that it was related to factory matters nor any evidence advanced to substantiate the plaintiff's contention. Bereft of any other cogent evidence, I am not satisfied on a balance of probabilities that the plaintiff had gone to Songkla to visit Pacific Fish Processing Co Ltd on factory related matters even assuming that the plaintiff as contended by him might not be strictly confined to the factory premises which the instruction as recorded in the minutes did not state in that specific term. I am however more inclined to accept the evidence of the first defendant for reason that the plaintiff was to act as advisor to factory related matters. Naturally, he ought to be in the factory. To go out of the country to purportedly negotiate business or company related matter on his own, to this court, would have exceeded his role as advisor on operation matters. In relation to the permission or approval to make the Songkla trip, the plaintiff alleged he got the approval from the acting general manager but the defendants said that the acting general manager was unaware of it. Since the acting general manager on whom subpoena had been applied for by the defendants but was unable to be served as he is currently working in Indonesia, evidence of the plaintiff that the said acting general manager had given the plaintiff verbal approval to go to Songkla and evidence of the defendants that they had confirmed with him via phone that he was unaware of the plaintiff's Songkla trip are basically hearsay evidence. The defendant's allegation of the insubordination is that the plaintiff had not obtained the permission of the CEO who is the first defendant. The first defendant said he did not give his permission to the plaintiff and SD1 testified that no business travelling application was submitted by the plaintiff in accordance with the normal procedure for this trip. I find that all these material facts were not successfully challenged by the plaintiff. The plaintiff averred that there was no necessity to apply via the business travelling application when he travelled by road and not by air. SD1 had denied that and said that such application applied to all business trips. I am prepared to accept SD1's evidence as he is the man in charge of human resources in the light that there is no other convincing evidence to the contrary. Thus, the onus is shifted to the plaintiff to adduce evidence or sufficient evidence to prove that he had obtained the requisite permission prior to his Songkla trip; if he leads no evidence or if he offers insufficient evidence, he must fail; see *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86. From the plaintiff's evidence vide his witness statement, P9, Q & A 12 which he extracted from his solicitor's letter dated 8 March 2003 in reply to the termination letter, the plaintiff stated merely that the acting general manager 'had at all material times been aware of the planned trip by me to Songkla, Thailand and also the purpose of the said trip and had not at any time

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prevented me from proceeding with the said trip. As such, I state that the defendants who were well aware of this had in the circumstances agreed and acquiesced to my said actions'. In other words, the plaintiff averred in his evidence-in-chief that the acting general manager was aware of the plaintiff making the trip but had not prevented the plaintiff from proceeding with the trip and the defendants had therefore acquiesced it. The plaintiff had never stated that he had applied for permission from the acting general manager and the latter had approved it but in cross-examination, he was assertive that the acting general manager had approved his trip to Songkla. I find the tone of language in the plaintiff's evidence an entire twist from examination-in-chief to cross-examination. His evidence in chief is couched with uncertainty so much so that he had to contend that there was an acquiescence instead of saying that there was an outright approval from the acting GM. I find element of inconsistency in the plaintiff's evidence in this respect which gives rise to a doubt whether the plaintiff had in actual fact sought the acting general manager's approval and obtained the alleged approval bearing in mind that he (the plaintiff) was an executive director while the approving authority was merely an acting GM. To this court, if the plaintiff had honestly sought the permission from the said acting general manager and obtained his permission or approval, I find no reason why the plaintiff could not say it loud and clear as the instructions vide the minutes of meeting held on 13 January 2003 (D — p 14) recorded vividly that the plaintiff was to report to the acting general manager. In order for the plaintiff to satisfy his onus of proof and his assertion that the acting general manager had verbally approved his Songkla trip, he should have called the acting general manager; otherwise, his evidence in this respect becomes, at best, a bare assertion disregarding the fact that it is hearsay. As succinctly stated by His Lordship Salleh Abas FJ (as he then was) in *International Times & Ors v Leong Ho Yuen*, according to ss 102 and 103 of the Evidence Act 1950, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail. The plaintiff asserts that the acting general manager had given him the approval; the onus is thus on him to call the acting general manager to testify to that effect. The latter is indeed an important and material witness to the plaintiff's assertion. The failure to call the acting general manager attracts an adverse inference under s 114(g) of the Evidence Act 1950 that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. I am therefore unable to come to a finding of fact that the plaintiff had obtained the necessary approval before he made his Songkla trip. I find that he had failed to rebut this aspect of the first allegation. As regards whether Pacific Fish Processing Co Ltd was a competitor of the second defendant, there is insufficient evidence except the bare assertion by the first defendant and the plaintiff respectively which are in conflict, to enable me to make any finding. Nevertheless, I find that the gist of the act of insubordination in this first allegation is the failure to obtain permission to go to Songkla although there

was specific instructions for him to stay in the factory to attend to operations. Whether Pacific Fish Processing Co Ltd was or was not a competitor is secondary. On a balance of probabilities, I find that the defendants had established this act of insubordination in this first allegation.

[25] The second act of insubordination alleged against the plaintiff states:

> On 19th February 2003 you had privately met with Mr. Ujiyama, President of Taikyo Ltd, a fish meal processing company, which is supposed to enter into a technical service agreement with A.S.K. Andaman Ltd. and had failed to inform the CEO of this private meeting which is an important matter to the company and this is also in contravention of the CEO's instruction for you to stay in the factory to attend to the operations.

[26] In order to constitute this alleged second act of insubordination, there must first be shown evidence that the CEO ie the first defendant had instructed the plaintiff to inform him of any private meeting with Mr Ujiyama or any party who had dealings with the second defendant in advance and obtain his consent before the plaintiff could meet the party. I must say that there is no evidence to that effect. What the first defendant ('SD2') had divulged in his witness statement D15 at Q & A 14, p 5 is that the plaintiff at the time when he met with Mr Ujiyama privately, the plaintiff knew very well that the second defendant's associate company, ASK Andaman Ltd was negotiating a technical service agreement with Mr Ujiyama's company which was matter treated as private, confidential and highly sensitive. The first defendant felt that the plaintiff's action of meeting Mr Ujiyama without informing first defendant and his superior in advance raised serious doubt as to the purpose of the said meeting. The plaintiff in his evidence said that it was a private dinner with an acquaintance when he met Mr Ujiyama on 19 February 2003 and there was nothing to do with company business. There is no evidence from the defendants to show that the meeting on 19 February 2003 had any relation to their business or whether there was anything adversed to the defendants as a consequence of this meeting. No doubt that the plaintiff had been instructed to act as advisor in relation to all factory related matters which entailed him to be in the factory to perform his duty and function but that instruction cannot be taken to restrict the plaintiff to only confining himself in the factory premises that he could not even go out for dinner with friends or family members. In the absence of any evidence to show that the first defendant had given the plaintiff the prior instruction or order that he could not meet Mr Ujiyama or any other specific party before consent having been obtained from the first defendant, there cannot be said to be any disobedience of the first defendant's order or instruction to constitute insubordination. From the first defendant's own words that he felt the plaintiff's meeting with Mr Ujiyama without informing him in advance raised serious doubt as to the purpose of their meeting, I am of the view that the first defendant himself was uncertain of the intent or purpose

of the meeting but was suspicious that it might jeopardise the outcome of the impending technical service agreement with Mr Ujiyama's company. I would say that this second act of insubordination is premised on uncertainty and suspicion which cannot be used as the basis to justify an act of insubordination. From the meanings of insubordination in *OP Malhotra's The Law of Industrial Disputes*, in order for any person to be 'disobedient' which is 'insubordinate', there must be a lawful order for which he disobeys. This is fundamental. I do not think that any employer could impose on an employee such implied obligation that the employee ought to seek prior consent before meeting an acquaintance who may have some dealings with the employer's company when such meeting is a personal one which has no relation with the company. If the employee has indeed acted against the interests of the company vide the said meeting, he could certainly be held for other misconduct or breaches of his employment agreement but not under insubordination when there is no specific instruction or order that he cannot do so. In *Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd*, the Federal Court held, inter alia, as follows:

> Held …
>
> (2) ... The duty of an employee at common law is also similar in that he is to comply with all lawful and reasonable orders given by his employer with respect to the performance of such functions within the scope of his employment. That duty is one of the fundamental obligations which is deemed to be impliedly undertaken in every contract of hiring, and is subject to the qualification that the employer may not order his employee to do anything illegal or dangerous.

[27] The implied term into the contract of employment is the duty to obey a lawful order or instruction which is neither illegal nor dangerous but the order or instruction must be clear or specific. It is untenable that an order or instruction can be implied. Having evaluated the evidence and submissions on this second act of insubordination I find on a balance of probabilities that the defendants had failed to prove such act to be insubordination.

OTHER MATTERS CONSIDERED

[28] On the the plaintiff's complaints that no charges were levelled against him to afford him an opportunity to defend himself and that he was not given the opportunity to be heard according to the rules of natural justice, a distinction ought to be drawn between the termination of the contract pursuant to any breach of any terms as agreed by the parties and dismissal of the employee pursuant to any misconduct which is not stipulated as a term of the contract. In this respect, His Lordship Arifin Zakaria JCA (now CJ (Malaya))

in delivering the judgment of the Court of Appeal in *Zakiah bte Ishak v Majlis Daerah Hulu Selangor* [2005] 6 MLJ 517; [2005] 4 CLJ 77 held, inter alia, as follows:

> Held
>
> ... The motive or reason for the termination was strictly a matter for the defendant as the employer. The plaintiff's contract of employment was terminated; she was not dismissed. There was, therefore, no necessity to afford her an opportunity of being heard. This was not the case of a dismissal under the guise of a termination
>
> ...

[29] In *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361 at p 367; [1997] 3 CLJ 135 at p 144 (FC), His Lordship Peh Swee Chin FCJ in delivering the judgment of the Federal Court said:

> ... in an ordinary contract of employment or personal service, an employee need not necessarily be given a reasonable opportunity of being heard before such dismissal or reduction in rank because such an employee cannot ordinarily in law compel his employer to reinstate him to his former job and therefore exercising a right of being heard is an exercise in futility in so far as it is sought to prevent such dismissal.

[30] See also *Aetna Universal Insurance Sdn Bhd v Ooi Meng Sua* at p 6; *Lim Tow Peng & Anor v Singapore Bus Services Ltd* [1976] 1 MLJ 254; [1976] 1 LNS 64 (CA). Therefore, the issue of the right of being heard under natural justice in the circumstances of this case, does not arise.

[31] The plaintiff's employment agreement dated 10 June 2002 specifically provided a termination clause ie cl 13. The defendants had exercised their right to terminate the said employment agreement pursuant to cl 13(i)(b) which provides that the agreement may be terminated:

> If the Employee commits any act of insubordination, insobriety, dishonesty or any other serious misconduct; …

[32] The defendants as employer had found the plaintiff employee to have committed two acts which they construed as insubordination and as insubordination is specifically stipulated as an agreed act within cl 13.1(b) that the defendants could terminate the agreement without notice or payment in lieu of notice should the plaintiff commit it, the exercise of the right conferred upon the defendants by cl 13.1(i)(b) is indeed a termination in accordance with the term of the contract and it is not a dismissal. Therefore, there is no necessity for the defendants to frame charges against the plaintiff and to afford him an opportunity of being heard as held in the authorities referred to above. If what

had been construed by the defendants in relation to the alleged act of insubordination is found to be wrong or unjustified, the defendants would be in breach of such term and the plaintiff's remedy would lie in damages for the wrongful termination of the contract.

[33] The plaintiff's principal claim is for a declaration that the termination vide the letter dated 21 February 2003 is null and void, of no effect and of no consequence (see para 23(a) of the statement of claim at p 37, bundle A). A declaration of such nature will virtually be compelling the defendants to reinstate the plaintiff as employee when the defendants could no longer repose trust and confidence in the plaintiff. This is not permissible in law as vividly held by the Federal Court in *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor*, inter alia, as follows:

> Held
>
> Per Peh Swee Chin FCJ
>
> The principle is that the law will not specifically enforce a contract of service between master and servant and that the master has always the power to dismiss the servant in breach of such contract without any danger of being compelled to re-employ him.
>
> ...
>
> It follows that, when the rights of parties are regulated or governed by an ordinary contract of employment, or where such rights are not modified or affected by any provisions of any statute, then, the fact that the dismissal of the employee is not in accordance with the procedure laid down in the contract does not prevent the dismissal from being effective to terminate the contract and the only remedy lies in damages The employee cannot, in these circumstances, claim that the dismissal is void, as that would indicate that he was asking for reinstatement.
>
> ...
>
> ... the claim for reinstatement available to a permitted claimant in an Industrial Court … is not available to the appellant. The principle aforementioned applies, and he is entitled to claim damages only if he can establish that his dismissal is in breach of his contract of service.
>
> The respondent was right in its objection that the appellant could not claim the declarations that his dismissal was void. The learned judge was right in upholding the objection, and was also correct when he held that it was not possible for the appellant to obtain reinstatement.
>
> ...

[34] At pp 370–371 (MLJ); pp 147–148 (CLJ), His Lordship Peh Swee Chin FCJ explained aptly further the distinction of the declarations sought:

> A clear distinction has to be made between a declaration that a dismissal is invalid and void on the one hand and on the other hand, a declaration that the dismissal is wrongful. The first mentioned declaration may be granted by the court with what in

> effect is a reinstatement, ie, that he continues in the employ etc. The secondly mentioned declaration is invariably granted with an order for damages only by virtue of the said principle. When a dismissal is merely wrongful, at some risk of repetition, a plaintiff is left only with a remedy in damages by virtue of the said principle. When a dismissal is void, or invalid, the dismissal that took place earlier never in effect, effectively took place because it is void, so the old job continues. To see things in their better perspective, let us say that a void or invalid dismissal is always wrongful, but not every wrongful dismissal is an invalid or void dismissal.

[35] The law has been well explained by His Lordship Peh Swee Chin FCJ and is amply clear. Following the aforesaid principles of law laid down by the Federal Court for which this court is bound, the plaintiff's claim for a declaration that his termination is null and void, of no effect and consequence which in effect is a reinstatement, cannot be allowed. His remedy only lies in damages for wrongful breach of the employment agreement as he claims under para 23(b) in his statement of claim. If plaintiff intended to seek reinstatement, he should do so in the Industrial Court pursuant to the Industrial Relations Act 1967; see *Perbadanan Perwira Harta Malaysia & Anor v Mohd Baharin bin Hj Abu* [2010] 5 MLJ 295; [2010] 6 CLJ 1 (CA). His claim herein, however, is based on his contract of employment for which to reiterate his remedy is limited to only damages for the wrongful termination of the contract of employment and without more. As regards the other heads of claim for general damages, aggravated and/or exemplary damages, I hold that the plaintiff is not entitled to such claims. His remedy is for damages for the breach of his employment contract but does not extend to general damages, aggravated and/or exemplary damages bearing in mind that the intent and purpose of awarding damages is to compensate the injured party the loss he has suffered and is never intended to enrich him. In *Addis v Gramophone Company, Limited* [1909] AC 488, the House of Lords held that:

> Where a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment.

[36] In any event, there is no evidence from the plaintiff to prove what he had alleged in para 23(c) of his statement of claim apart from his bare assertions which I am not convinced that they are proved. On the question of damages, general damages and exemplary damages, I agree with the submission by learned counsel for the defendants that damages, and general damages have not been proved by the plaintiff. The plaintiff cannot throw them at the feet of the court and expect wonders to happen; he had to prove them by leading evidence; see *Prehn and another v The Royal Bank of Liverpool* (1869–71) 5–6 LR Exch 92; *Commissionersfor executing office of Lord High Admiral of United Kingdom v Owners of Steamship Susquehanna, The Susquehanna* [1926] AC 655

at p 661; *Stroms Bruks Aktie Bolag v John & Peter Hutchison* [1905] AC 515; and *Perestrello e Companhia Limitada v United Paint Co; Same v Same* [1969] 1 WLR 570 (CA). For aggravated damages, I find no outrageous act in this case on the part of the defendants to warrant such consideration. To a certain extent, the defendants had valid ground as held by this court in respect of the first act of insubordination above to resort to the action taken by them against the plaintiff. As for exemplary damages, the plaintiff had failed to conform with any of the three conditions as propounded by Lord Devlin in *Rookes v Barnard and others* [1964] AC 1129 to qualify for such claim. These three conditions which are the exceptional cases are: (i) where the conduct is calculated to make or to result in a profit; (ii) where there is oppressive conduct by government servants; and (iii) where there is express authorisation by statute. No exemplary damages will be awarded unless it falls within one of the three exceptions above. Further, even from the conduct of the parties which may render consideration for exemplary damages, in the circumstances of this case, however, I do not find any contumelious conduct on the defendant to merit consideration for exemplary damages.

CONCLUSION

[37] The letter of termination of the plaintiff's employment agreement cited two acts of insubordination upon which the defendants relied on to terminate the said agreement pursuant to cl 13.1(i)(b) contained therein. These acts of insubordination are not cited in the alternative but conjunctively and hence the burden on the defendants is to justify not one but both the said acts. It is not the view of the court whether one of these two acts suffices to constitute insubordination to justify the termination of the said agreement or whether both acts accumulatively would be adequate to enable the defendants to do so but it is the view of the employer themselves. The court must not substitute its own views as to what is appropriate for the employer to justify the termination of the contract of service of the employee. The appropriate decision to terminate ought to be the views of the employer. An analogy can be drawn from the case of *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153; [1998] 1 CLJ 405 where the Federal Court discussed on the appropriate punishment to be imposed and held, inter alia, that 'the Court must not substitute its own views as to what is the appropriate penalty (for the employee's misconduct) for the view of the particular employer concerned'. In the instant case, if the defendants deem both acts to adequately constitute their ground to terminate the plaintiff and not a single act, this court cannot substitute its views by saying that only one of the two will suffice to justify the termination unless the defendants said so. For that reason, although this court has found the defendants to have proved the first act of insubordination, this court cannot hold that that alone to be sufficient to terminate the plaintiff's contract of employment as opposed to the defendants' view even if this court is of the view

that the first act itself is a serious act of insubordination which may justify termination of the contract of employment. The role of the court is to determine whether the employer is able to prove or justify the grounds for which he relies on to terminate the employee but not to enter into the arena of the employer to decide whether one or more acts of misconduct or acts of insubordination would be sufficient to justify the termination. Flowing from that, since this court has found the defendants to have failed to prove the second act of insubordination above, this benefit ought to be given to the plaintiff. With that, I conclude that the termination of the plaintiff's employment agreement pursuant to cl 13.1(i)(b) particularly in relation to the second act of insubordination is unjustified and hence wrongful. As this court has found that damages are not proved, nominal damages will therefore be considered.

[38] The plaintiff is not totally unblameable but had contributed towards this termination of his contract of service. Had he been obedient to the lawful instruction or order to perform his functions and duties, or had he applied leave to attend to his private affairs, there will be no valid reason for the defendants to hold him for insubordination. I also wish to note that if the defendants had cited the two acts of insubordination in the alternative or independent of one from the other, the plaintiff may not be as lucky to succeed in his claim as this court views any disobedience of a lawful order or instruction to be a serious indiscipline which may attract a severe sanction such as termination of the contract of service. When an employee is unable to take and follow superior order or instruction, I do not think that his employer can continue to repose trust and confidence in him and to retain the master and servant relationship; termination would seem inevitable.

[39] Having considered this case as a whole together with all submissions, I enter judgment for the plaintiff and award him nominal damages in the sum of RM30,000 which is fair and reasonable in all the circumstances in this case together with costs of RM5,000.

Judgment entered for plaintiff by awarding him nominal damages in the sum of RM30,000 with costs of RM5,000.

Reported by Kohila Nesan